

No. 91998-4

SUPREME COURT
OF THE STATE OF WASHINGTON

CANDACE NOLL, individually and as Personal
Representative of the Estate of Donald Noll, Deceased,

Respondents,

v.

SPECIAL ELECTRIC COMPANY, INC.,

Petitioner,

American Biltrite, Inc., *et al.*,

Defendants.

**PETITIONER'S ANSWER TO AMICUS CURIAE BRIEF OF
WASHINGTON DEFENSE TRIAL LAWYERS**

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As the Washington Defense Trial Lawyers correctly observes, while the Court of Appeals claimed to rely on Justice Breyer's opinion in *J. McIntyre Machinery, Ltd. v. Nicastro*, 564 U.S. 873, 131 S. Ct. 2780, 180 L. Ed. 2d 765 (2011), the Court of Appeals' test for determining whether personal jurisdiction could be exercised over Special Electric in actuality "looked nothing like Justice Breyer's." WDTL's Brief at 10. Instead of applying Justice Breyer's requirement that a defendant must be shown to be at least aware that their product is being sold into the forum state, the Court of Appeals—as the WDTL correctly points out—instead relied on Justice Stevens's test in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987), under which a court may exercise personal jurisdiction without a showing of awareness if the defendant's product is found to be a "known hazardous material." WDTL's Brief at 10 (citing *Noll*, 188 Wn. App. at 583).

The WDTL correctly states that Justice Stevens' notion, that personal jurisdiction can be based on the hazardous nature of a defendant's product, has never garnered the support of a majority of the Justices of the Supreme Court of the United States. WDTL's Brief at 10. Nor could it, because the hazardousness of a defendant's product literally has nothing to do with whether a defendant has *purposefully availed* itself of the benefit of doing business in the forum state, which has been the cornerstone requirement for the exercise of personal jurisdiction at least since *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Indeed, in *World-Wide Volkswagen* the

Supreme Court of the United States had already ruled out giving any weight to the hazardousness of a defendant's product. *See* 444 U.S. at 296 n. 11 (rejecting allowing a court to exercise personal jurisdiction over the seller of an automobile based on the hazardousness of motor vehicles generally, in the absence of a showing of purposeful availment) ("The 'dangerous instrumentality' concept apparently was never used to support personal jurisdiction; and to the extent it has relevance today it bears not on jurisdiction but on the possible desirability of imposing substantive principles of tort law such as strict liability.").

The WDTL also correctly observed that the Court of Appeals erred in basing the exercise of jurisdiction on a finding of a "regular flow" of Special Electric's asbestos into Washington. WDTL's Brief at 11. The Court of Appeals' error in this regard is rooted in the court's truncated reading of Justice Brennan's concurrence in *Asahi Metal Indus. Co., Ltd. v. Superior Court*, 480 U.S. 102, 107 S. Ct. 1026, 94 L. Ed. 2d 92 (1987). As the WDTL correctly recognizes, Justice Brennan made clear that the defendant must be shown to have been *aware* of the flow of its product into the prospective forum state, before it can be said that the constitutional requirement of purposeful availment has been satisfied and personal jurisdiction therefore may be exercised by that state. WDTL's Brief at 11-12; *see Asahi*, 480 U.S. at 117 (Brennan, J., concurring) (the nonresident must be "aware" that its product "is being marketed in the forum State.").

The WDTL also correctly underscores the importance of the decision of the Supreme Court of the United States in *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). WDTL’s Brief at 14-18. Although *Walden* is not a stream-of-commerce case as a matter of its facts, the Supreme Court’s unanimous restatement in that case of the basic requirements for the exercise of personal jurisdiction effectively rules out the Court of Appeals’ reliance here on the Washington-directed conduct of CertainTeed to find a basis for the exercise of personal jurisdiction over Special Electric. As the WDTL correctly states, *Walden* makes plain that the exercise of personal jurisdiction, and in particular the exercise of *specific* personal jurisdiction (the only basis for personal jurisdiction asserted here), must be based on the defendant’s suit-related conduct, and whether that conduct created a substantial relationship between the defendant and the forum state. WDTL’s Brief at 16. And as the WDTL correctly recognized, the Nolls “offered no evidence that Special Electric was aware of CertainTeed’s distribution or channels of sales, or that Special Electric knew of CertainTeed possessing any nationwide distribution network or intent to specifically sell finished products containing Special Electric’s product into Washington State.” *Id.*

In sum, the WDTL has ably summarized the principles that should govern the outcome of this personal jurisdiction dispute. Whatever the merits the Court of Appeals’ approach might have had in the days before *World-Wide Volkswagen*, that approach has been rendered untenable by *World-Wide Volkswagen* and its progeny. Accordingly, this Court should

reverse the Court of Appeals, and reinstate the dismissal of the claims against Special Electric because the courts of this state lack the authority to adjudicate those claims.

Respectfully submitted this 4th day of January, 2017.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 4th day of January, 2017.

Patti Saiden

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CARNEY BADLEY SPELLMAN

January 04, 2017 - 9:59 AM

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